

7 Official Opinions of the Compliance Board 69 (2010)

Public Body – School redistricting committee not a public body as it was not established by formal action of the County Board of Education.

Administrative Function – Superintendent briefing of County Board of Education concerning matters delegated to him that did not involve Board discussion of policy within exclusion

December 22, 2010

Nick Myers

The Open Meetings Compliance Board has considered your complaint concerning the application of the Open Meetings Act to the Calvert County School System's Barstow Redistricting Committee ("BRC") and BRC subcommittees. Your complaint also suggested that the Calvert County Board of Education ("County Board") may have violated the Act on February 28, 2008, when it held a closed administrative session in connection with school redistricting.

For the reasons explained below, we find that the BRC and its subcommittees were not subject to the Open Meetings Act in that the entities did not meet the definition of a public body. The relevant discussion during the closed portion of the County Board meeting involved an administrative function to which the Act did not apply.¹

I

Complaint and Response

According to the complaint, the BRC was tasked with developing school redistricting options for presentation to the County Board. In your view, the BRC and its subcommittees are "public bodies" governed by the Open

¹ We addressed the County Board's February 28, 2010, meeting in an earlier opinion, 6 *OMCB Opinions* 171 (2009). Because of pending litigation concerning school redistricting, the response to the earlier complaint did not address redistricting. Therefore, we were unable to address the issue at that time.

Meetings Act. Among the attachments to your complaint were policy statements governing the County Board's redistricting process. You noted that the Superintendent of Schools recommended individuals to serve on the BRC to the County Board and the County Board in turn made the appointments. According to the complaint, the public only learned of the BRC meetings through a press release announcing County Board hearings on redistricting after the BRC had developed two redistricting plans. You indicated that no notice of BRC meetings was provided to the public nor were minutes adopted reflecting the BRC's work. Citing a document captioned "Redistricting Principles," your complaint noted that the BRC did not intend to operate in view of the public.

In the words of the complaint, "[t]here was no publicly available information about the [BRC] meetings: [no] agenda; location; minutes; records; actions; membership; meeting locations; public viewing options whatsoever."² The complaint also noted that the BRC formed subcommittees that operated without regard to the requirements of the Open Meetings Act.

The complaint further questioned whether the County Board violated the Open Meetings Act on February 28, 2008. According to the complaint, the County Board did not record the vote to close its meeting nor did it report in its minutes the decision to make recommendations to the BRC. The complaint also questioned whether the topic of redistricting ought to have been discussed by the County Board in a closed meeting.

In a timely response on behalf of the County Board and BRC, Dario Agnolutto, Esquire, indicated that the school system has long operated with the understanding that committees appointed at the sole discretion of the Superintendent of Schools are not subject to the Open Meetings Act. The response offered a different interpretation of the policies relied on by the complainant. According to the response, the County Board's policy requires that the Superintendent develop procedures to implement the County Board's redistricting policy, a policy that acknowledges the importance of community involvement in the educational process. But the County Board "is not involved in the creation, adoption, administration or interpretation of the Superintendent's administrative procedures" and there is no "requirement that

² In this regard, the complaint goes beyond what the Open Meetings Act requires. While the Act grants the public a right to attend open meetings and requires that reasonable notice be given and meeting minutes be maintained, it does not require that an agenda for a meeting made available. *See, e.g., 6 OMCB Opinions* 196, 198 (2009).

a redistricting committee be established as the means by which the [p]olicy is to be implemented.” While Superintendents have historically chosen to use a committee as a means of providing school and community input for recommendations to the County Board, alternative methods could have been used to satisfy the County Board’s policy. As to the concern the County Board “approves” the redistricting committee members, the response indicated that, “this is not the practice, intent, nor application” of the Superintendent’s administrative process. The only language in the Superintendent’s administrative process relevant to approval is Section A - - a provision that “is nothing more than the Superintendent affirming that he does not commence the redistricting process until the [County] Board is ready for him to do so.” According to the response, this language “has never been interpreted to require the [County] Board to approve any committee or committee members.”

The response further argued that, even if it was found that the Open Meetings Act applied to the BRC, the two subcommittees would not have been subject to the Act. At no time was a quorum of the BRC present or expected at a subcommittee meeting.

The response also argued that the County Board did not violate the Open Meetings Act at its administrative session on February 28, 2008. The response noted that “[t]he issues discussed ... related to the Superintendent’s performance of his administrative duties, the administration of the laws of the State and policies of the [County] Board and general housekeeping matters.” “[D]iscussion ... pertained to the Superintendent’s explanation of what his staff was prepared to cover in the Work Session to immediately follow the Administrative session; not consideration of the items themselves. ... There were no decisions made, or discussion, by Board members of the redistricting in the Administrative session; the entire discussion by the Board members occurred in the duly advertised public Work Session.”

As to the allegation concerning the failure to record the vote to close the meeting, the response simply noted that this issue was resolved in 6 *OMCB Opinions* 171 (2009). Among attachments to the response were affidavits of Dr. Jack R. Smith, Superintendent of Schools, and William J. Phalen, Sr., President of the County Board, affirming factual information included in the response.

II

BRC and Subcommittees

The initial issue we must consider is whether the BRC is a “public body” as that term is defined in the Open Meetings Act. If the BRC or its subcommittees are not public bodies, the Open Meetings Act requirements do not apply to them.

Both the complaint and response cite 7 *OMCB Opinions* 21 (2010), where we addressed the application of the Act to the West Towson Elementary School Boundary Study Committee. In that opinion, we explored the different scenarios under which a multi-member entity might qualify as a public body under the Open Meetings Act. We first ruled out §10-502(h)(2),³ concluding that this aspect of the definition did not apply. 7 *OMCB Opinions* at 26. We then focused on §10-502(h)(1). Even though the committee was appointed by an area assistant superintendent and the committee advised an area assistant superintendent rather than the board, we determined that it nonetheless qualified as a public body because a school board policy required establishment of a redistricting committee. 7 *OMCB Opinions* at 27. Although the policy was not specific as to the composition of the committee, the detail necessary to apply the Act was adequately addressed through the Assistant Superintendent’s actions. *Id.*⁴

In arguing that the BRC is a public body, the complaint distinguished the West Towson opinion in that, in Calvert County, the members of the BRC were recommended by the Superintendent to the County Board and the County Board approves the actual appointments. The response also distinguished the West Towson in that, in Calvert County, there is no school board policy mandating establishment of a committee. The committee was created solely by action of the Superintendent and the County Board did not name the committee members.

Given the description of the appointment process in the Superintendent’s procedures implementing the County Board’s policy, we understand why it

³ Unless otherwise noted, statutory references throughout this opinion are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

⁴ We went on to determine that the meeting at issue did not violate the Act because it did not involve a quorum of the committee. 7 *OMCB Opinions* at 28.

would appear to the complainant that the BRC is actually appointed by the County Board.⁵ Nonetheless, given the explanation of the County Board's counsel and the descriptions in the accompanying affidavits, we accept the school system's explanation of the limited role of the County Board. It is clear that the policy adopted by the County Board does not require that a committee such as the BRC be established. Nor were the Superintendent's procedures ever adopted as a policy of the County Board. Unlike the process employed in the West Towson opinion, we find that the BRC does not qualify as a public body under the Open Meetings Act in that it was not established by formal action of the County Board so as to trigger §10-502(h)(1). And for the reasons we explained in 7 *OMCB Opinions* 21, the BRC does not qualify as a public body under §10-502(h)(2).

The response did not explain how the two subcommittees of the BRC were actually established. Apparently, the subcommittees were informally created by the BRC itself. While the Superintendent's procedures implementing the County Board's policy provides for the creation of subcommittees, it does not appear that the County Board played any role in the subcommittees' creation. For the reasons explained above in connection with the BRC, we find that subcommittees did not qualify as public bodies as defined by the Act.

In summary, we find that the BRC and its subcommittees were not public bodies. Thus, the requirements of the Open Meetings Act did not apply the meetings.

III

Board of Education Meeting

The final aspect of the complaint focused on a County Board meeting on February 28, 2008. As we understand the facts, the County Board conducted distinct sessions as part of a single meeting on that date. According to the response, the "issues discussed at the Administrative Function Meeting" were limited to "the Superintendent's performance of his administrative duties, the administration of the laws of the state and the policies of the Board and general housekeeping matters ... [including] the Superintendent's explanation of what

⁵ Section A of the Superintendent's procedures provides, in part, that "[t]he Superintendent will recommend to the Board of Education representatives from [enumerated] groups Upon approval by the Board of Education, the Superintendent will send letters to each representative informing them of their appointment."

his staff was prepared to cover in the Work Session to immediately follow the Administrative session ...” This description was supported by the affidavits included with the response. As to the work session, the response indicated it was an open session and televised. Included with the response was a copy of the minutes reflecting both sessions and an accompanying transcript of the redistricting portion of the public work session.

In a prior opinion, we addressed at considerable length the administrative function exclusion -- then known as the executive function -- under the Open Meetings Act as it applied to local boards of education. 3 *OMCB Opinions* 39 (2000). Since that time, the Legislature has changed the name of an “executive function” to “administrative function,” but the substantive definition as well as the test we have long applied remain unchanged. §10-502(b); 3 *OMCB Opinions* at 40. We noted, without deciding, that consideration of a proposed redistricting plan (as opposed to proposed policies governing future redistrictings) may well be an executive function outside the scope of the Act. 3 *OMCB Opinions* 39, 46 n. 6 (2000). For example, if a local school board was administering §4-109(c) of the Education Article and applying a previously adopted policy to reach a redistricting decision, the school board would likely be engaged in an administrative function as defined by the Act. On the other hand, if a local school board was developing policy in connection with a particular redistricting proceeding, by definition, its actions would constitute a legislative function, therefore, could not qualify as an administrative function under the Act.

According to the County Board’s response, the Superintendent used this closed administrative session to address matters under his authority and, among other matters, set the stage for the presentation on the redistricting process that the Superintendent’s staff would follow in the subsequent public work session. The affidavits submitted as part of the County Board’s response support this position. The County Board did not discuss the proposed redistricting plans at that time. Under the circumstances, we find that Superintendent’s briefing of the County Board concerning a matter that had been delegated to him, *i.e.*, development of the plans recommendation to the County Board, qualified as an administrative function outside the scope of the Act. §10-503(a)(1)(i).⁶ Nevertheless, given that the County Board would

⁶ Although the Open Meetings Act ordinarily has no application to a meeting involving matters that qualify as an administrative function, when a public body addresses such matters in a meeting closed to the public during part of a meeting governed by the Open Meetings Act, the Act does require certain minimum

(continued...)

need to subsequently act on the redistricting issue, the better course would have been to include the Superintendent's presentation as part of the public work session.

As to the disclosure of the vote closing the meeting that date, we agree with the County Board that this matter was fully addressed in an earlier opinion involving the County Board. 6 *OMCB Opinions* 171 (2009).

IV

Conclusion

In summary, we find that BRC and its subcommittees did not constitute public bodies subject to the Open Meetings Act. As to the closed portion of the County Board meeting on February 28, we find that discussions concerning redistricting were limited to the Superintendent briefing the County Board on the manner by which his staff would brief the County Board during the subsequent public work session on a matter that had been delegated to the Superintendent. Because the County Board would subsequently be involved in the redistricting issue, the better course would have been to include the Superintendent's presentation as part of the public work session. Nonetheless, we find that this briefing did qualify as an administrative function to which the Open Meetings Act did not apply.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth A. Nilson, Esquire
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⁶ (...continued)

disclosure requirements. See §10-503(c). We express no opinion as to whether the County Board complied with this provision in that it was not addressed in the record before us.